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JAN 30 1967
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1020

XENIA D. MAGBANUA,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

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XENIA D. MAGBANUA,

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IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, Xenia D. Magbanua, prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case, which rejected her claim that because of the release by the Government of the Philippines she was outside of the scope of the Mutual Educational and Cultural Exchange Act of 1961.

JUDGMENT AND OPINION OF THE COURT BELOW.

Appeal was taken to the United States Court of Appeals for the Seventh Circuit from the entry of an order by the Board of Immigration Appeals in favor of the Respondent, approving the determination of the Special Inquiry Officer.

On the appeal, the Petitioner made a claim that the two year foreign residence requirement as provided in Section 212(e) of the Immigration and Nationality Act (8 U. S. C. A. 1182(e)) was not applicable once the foreign participating government released the Petitioner from her obligation. The Court of Appeals in the said decision of November 10, 1966 rejected the Petitioner's claim.

The opinion of November 10, 1966 is not as yet reported.

JURISDICTION.

The Order of the United States Court of Appeals for the Seventh Circuit affirming the decision of the Board of Immigration Appeals and rejecting Petitioner's claim was filed on November 10, 1966. This petition is filed within 90 days of that order. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

1. Does the issuance of a release by the participating foreign government place an alien outside of the scope of the two year foreign residence requirement of Section 212(e) of the Immigration and Nationality Act (8 U. S. C. 1282(e))?

STATUTE INVOLVED.

Section 212(e) of the Immigration and Nationality Act of 1952 as amended (8 U. S. C. 1182(e)).

STATEMENT OF THE CASE.

This case involved an appeal from the decisions of the Special Inquiry Officer and the United States Court of Appeals for the Seventh Circuit in favor of the Respondent, upholding an order denying the Petitioner's application for adjustment of status under Section 245 of the

Immigration and Nationality Act (8 U. S. C. 1255). This petition prays the Court to issue its Writ to review the rejection of the claim made by the Petitioner wherein it was argued that the Government of the United States should give full faith and credit to the release issued by the Government of the Philippines.

STATEMENT OF FACT.

Petitioner is a 26 year old single female, a native and citizen of the Philippines. She was last lawfully admitted to the United States as a non-immigrant visitor for pleasure at Detroit, Michigan on or about November 2, 1965, and since that time has resided in the United States without interruption.

The Petitioner was served with an Order to Show Cause on February 23, 1966 charging her with being deportable under Section 241(a)(9) of the Immigration and Nationality Act (8 U. S. C. 1251(a)(9) in that she failed to comply with the conditions of her non-immigrant status. Therefore, on March 16, 1966, hearings were held before a Special Inquiry Officer at which time the Petitioner admitted all of the factual allegations in the Order to Show Cause and at the conclusion of the question of deportability, the Petitioner applied for adjustment of status under provisions 245 of the Immigration and Nationality Act (8 U. S. C. 1255)).

The Petitioner first came to the United States in March of 1962 as a participant in a designated exchange visitor program under the provisions of the Mutual Educational and Cultural Exchange Act of 1961 (75 Stat. 535) as a nurse and she remained in said country under such status until September 16, 1964. In September of 1964, she left the United States for Canada for further training and she resided there until she re-entered the United States on November 2, 1965.

In the course of the hearing, the Petitioner introduced into evidence a release from her exchange visitor commitment by the Government of the Philippines.

On March 15, 1966, the Special Inquiry Officer denied the Petitioner's application for adjustment of status on the ground that she was ineligible under the provisions of Section 212(e) of the Immigration and Nationality Act (8 U. S. C. 1282(e)). This decision was appealed to the Board of Immigration Appeals on May 3, 1966, the Board of Immigration Appeals sustained the decision of the Special Inquiry Officer.

A Petition for Review was filed in the United States Court of Appeals for the Seventh Circuit under the provisions of Section 106 of the Immigration and Nationality Act (8 U. S. C. 1105(a)).

REASONS FOR GRANTING THE WRIT.

This Court should exercise its jurisdiction in this case for the following reasons:

1. The reasons for the restrictive foreign residence requirement set forth in Section 212(e) of the Immigration and Nationality Act (8 U. S. C. 1282(e)) were for the sole and limited purpose of protecting the participating foreign government. Once that government has unequivocably released an individual from his duty to return, then the restrictive provisions of the United States Immigration laws must logically and rationally fall.

It is the position of this Petitioner that the Mutual Educational and Cultural Exchange Act of 1961 (75 Stat. 735) which amended Section 212(e) of the Immigration and Nationality Act is being unduly restricted in its application.

The Immigration and Naturalization Service officials and the Court below seem to be under the misapprehension that

upon the expiration of an alien's stay under the Exchange Program, they must return to their country of origin and we have no discretion in keeping them here except under the provisions of Section 212(e) whereby waivers may be granted upon proof of hardship. They do not seem to appreciate the fact that this is a mutual agreement and we have no right to keep these people here without the consent of the participating country involved unles we do so under the hardship provision, but where the participating government in question has waived its right to the return of an exchange visitor, we are then left free to determine for ourselves whether or not such alien is desirable.

Informal estimates by the local Consul General of the Government of the Philippines point out that there are hundreds of qualified doctors and nurses from the Philippines who are in the same identical legal position as the Petitioner in the case at Bar. Our local hospitals are desperately and critically short of trained medical personnel. Although the Record does not reflect it, nevertheless, I think that the Government will stipulate that the Petitioner has never been the beneficiary of any grants either by the Government of the United States or by the Government of the Philippines. She paid her own way to the United States on the occasions of both of her entries.

This case is one involving compelling humanitarian factors not only for the Petitioner and persons similarily situated, but granting the Petitioner the right to remain in the United States would definitely benefit the general welfare of the United States. The only case in which minutely involved this question is *Mendez* v. *Major*, 226 F. Supp. 364 (1963) at page 367 there was some mention made of the fact that in that case the Government of Mexico did not object to the stay in the United States of Dr. Mendez. However, this facet of this case was not advanced on appeal and that case was argued on the exceptional hardship question only.

CONCLUSION.

Wherefore, for the above and foregoing reasons, we respectfully submit that a Writ of Certiorari issue to the United States Court of Appeals for the Seventh Circuit to review the decision of that Court rejecting this Petitioner's application for adjustment of status.

Respectfully submitted,

MELVYN E. STEIN,
One North LaSalle Street,
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Attorney for Petitioner.

APPENDIX 1-A.

IN THE UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.

Chicago, Illinois 60604.

Thursday, November 10, 1966.

Before

Hon. Elmer J. Schnackenberg, Circuit Judge.
Hon. Win G. Knoch, Circuit Judge.
Hon. Thomas E. Fairchild, Circuit Judge.

No. 15756

XENIA D. MAGBANUA,
Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

Petition for Review of an Order of the Immigration and Naturalization Service.

This cause came on to be heard on the petition to review an order of the Immigration and Naturalization Service and the record from the Immigration and Naturalization Service, and was submitted to the Court without oral argument.

On consideration whereof, it is hereby ordered and adjudged by this Court that the order of the Immigration and Naturalization Service in this cause appealed from be, and the same is hereby Affirmed, in accordance with the per curiam order of this Court entered this day.

IN THE UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.

Chicago, Illinois 60604.

November 10, 1966.

Before

Hon. Elmer J. Schnackenberg.
Hon. Win G. Knoch.
Hon. Thomas E. Fairchild.

No. 15756.

XENIA D. MAGBANUA,
Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

Petition for Review of an Order of the Immigration and Naturalization Service under Public Law 87-301.

This Court has considered the record in this matter as transmitted to this Court from the Immigration and Naturalization Service, in addition to the briefs filed by the respective parties herein, oral argument having been waived. Having taken the case under advisement for decision, the Court has conferred thereon, and is now of the opinion, and accordingly holds and adjudges that the decision of the District Director herein does not represent an abuse of her discretion. *Carmelita Teves Carriaga,* v. *I. N. S.,* No. 15542, 7 Cir., Nov. 2, 1966.

WHEREFORE, the decision respecting which this petition for review was filed is affirmed and the Clerk of this Court is directed to enter the judgment of this Court accordingly.

IN THE UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.

Chicago, Illinois 60610.

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typed pages contain a true copy of judgment order entered November 10, 1966 and judgment entered November 10, 1966 in Cause No. 15756, Xenia D. Magbanua vs. Immigration and Naturalization Service, as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

IN TESTIMONY WHEREOF I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 9th day of December A. D. 1966.

KENNETH J. CARRICK,

(SEAL) *Clerk of the United States Court of Appeals for the Seventh Circuit.*

APPENDIX 1-B.

IN THE UNITED STATES COURT OF APPEALS.
For the Seventh Circuit.

September Term and Session, 1966.

No. 15542.
CARMELITA TEVES CARRIAGA, *Petitioner,*
v.
IMMIGRATION AND NATURALIZATION SERVICE, *Respondent.*

Petition for Review of Order of the Immigration and Naturalization Service.

November 2, 1966.

Before MAJOR, *Senior Circuit Judge,* and KNOCH and FAIRCHILD, *Circuit Judges.*

PER CURIAM. A special inquiry officer of the immigration and naturalization service denied petitioner's application for adjustment of status under 8 U. S. C. A. sec. 1255, and ordered her deported. She petitioned for review.

The petitioner, Dr. Carriaga, is a physician, and a citizen of the Philippines. She last entered the United States in May, 1965 as a nonimmigrant visitor for pleasure, and has remained beyond the permitted period. In that status, she is deportable.

She first came to the United States in June, 1962 as an exchange visitor under the Mutual Educational and Cultural Exchange Act of 1961 (75 Stat. 535). She left in July, 1964. She spent part of her ten months of absence from the United States in Australia and part in the Philippines.

Because Dr. Carriaga entered the United States as an exchange visitor and has not, since her departure, been physically present in the Philippines (or in another foreign country under specified circumstances) for an aggregate of two years, 8 U. S. C. A. sec. 1182 (e), by its terms, bars her present application.

It appears that the Philippine government has released Dr. Carriaga from any obligation to return to that country. Her counsel argues that the two-year requirement was intended for the benefit of the Philippines and that such release effectively disposes of it. He urges that the United States needs physicians. It may well be that it would be in the public interest to permit a physician to remain in this country and render services under these circumstances, but the statute contains no provision permitting that result.

The order under review is AFFIRMED.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1020

XENIA D. MAGBANUA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner is a nurse who came to the United States from the Philippines in March 1962 as a participant in an exchange program under the Mutual Educational and Cultural Exchange Act of 1961 (75 Stat. 535). After going to Canada in 1964, she reentered the United States in November 1965 and has since remained here. Petitioner was ordered deported on the ground that she had failed to comply with the conditions of her non-immigrant status. At the deportation hearing, petitioner admitted her deportability but applied for adjustment of status, presenting a release by the Philippine Government of her commitment to that government. The Special Inquiry Officer and the Board of Immigration Appeals

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held that petitioner was ineligible for such relief under the provisions of Section 212(e) of the Immigration and Nationality Act, 8 U.S.C. 1182(e). The court of appeals affirmed on the authority of its decision in *Carriaga* v. *Immigration and Naturalization Service,* decided November 2, 1966, pending on petition for a writ of certiorari, No. 970, this Term. The issue which petitioner raises is identical to that in No. 970—*i.e.,* whether the restriction of Section 212(e), which prohibits exchange students from applying for immigrant visas or permanent residence until the expiration of two years of residence in a foreign country after departure from the United States, applies when the country from which the exchange student has entered has executed a release from any commitments to that country. For the reasons stated in our brief in opposition in No. 970, we believe that the decision of the court below was correct and that no further review is warranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FEBRUARY 1967.